United States District Court
District of Massachusetts

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U.S. DISTRICT COURT
DISTRICT OF MASS.

Pierre Richard Augustin, PRO SE)
Plaintiff,)
)
v.) **C.A. No. 06-10368-NMG**
)
DANVERSBANK, ET AL.,)
Defendants.)

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS WITH SUPPORTING AUTHORITY

CERTIFICATION OF PERSONAL CONSULTATION

Plaintiff hereby certifies that on May 16, 2006 he hand delivered to the United States District Court of Massachusetts and has followed Rule 7.1(a)(2) prior filing his Memorandum of point and authorities in opposition to defendant's motion to dismiss.

1. Emancipation Redress

In America, no one is considered to be above the law. The United States Constitution is considered the supreme law of the land both because of its content and because its authority is derived from the people.

Plaintiff strongly believes in the transparency of the judicial system in the United States of America to uphold the law in the search of Justice. For, it is the only forum whereby an average 'Joe' citizen like myself who never had any infraction with the law, was left with the only viable option of bankruptcy to protect his property rights without money, status and political connection in seeking the emancipation and the redress from the violation of the law by defendants's powerful corporations with unlimited budget represented by the most savvy lawyers on just about equal term.

Intuitively, plaintiff recognizes that he is facing lawyers that are well schooled with an in-depth knowledge of the law and various courtroom strategies that he lacks. Although not a lawyer or pretending to be one, plaintiff action is symmetrical to many pro se individual from the early settlers in the state of Massachusetts who could not afford expensive legal representation in the search of fairness, equal protection and justice under the law.

Unequivocally, the paramount reason for plaintiff complaint against the defendants rest on the principle of Emancipation and Redress which are intertwined with his property rights as "the guardian of every other right". Thus, plaintiff arguments are based on the following Rule of Law and others as deemed appropriate:

A. 1st **Amendment**, "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances."

B. 5th **Amendment**, "No person shall be … deprived of life, liberty, or property, without due process of law"

C. 7th **Amendment**, "…The right of trial by jury shall be preserved."

D. **14th Amendment**, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

E. **Natural Rights**, "Weakness allures the ruffian, but arms, like laws, discourage and keep the invader and plunderer in awe, and preserve order in the world as well as property. Horrid mischief would ensue were the law-abiding citizens deprived of the use of them, and the weak will become a prey to the strong." — Thomas Paine

F. **Common Law**, In *Beard v. U.S.*(158 U.S. 550, 1895), the Court approved the common law rule that a person "may repel force by force" in self-defense, and concluded that when attacked a person "was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force" as needed to prevent "great bodily injury or death."

G. **Pro Se Litigants**, "Courts are particularly cautious while inspecting pleading prepared by plaintiffs who lack counsel and are proceeding pro se. Often inartful, and rarely compose to the standards expected of practicing attorneys, pro se pleadings are viewed with considerable liberality and are held to less stringent standards than those expected of pleadings drafted by lawyers". (Antonelli v. Shehan, 81 F. 3d 1422, 1427 (7th Cir. 1996)). Also, "parties appearing pro se are allowed greater latitude with respect to reasonableness of their legal theories (Patterson V. Aiker, 111 F.R.D. 354, 358 [N.D. GA 1986]) and according to section D of Rule 11 of the Federal Rule of Civil Procedure.

2. Defendant violated Local Rule 7.1(a)(2)

The ***facts*** **and** ***circumstances*** **reveal** that there were no attempt made by neither the defendant or their counsel to comply with Local Rule 7.1(a)(2) nor was there any certification accompanying their motion to dismiss.

The issue is covered by a ***Rule of law*** of Local Rule 7.1(a)(2)(Motion Practice) which states that "No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue."

Analysis - The fact help to prove that the defendant or their counsel did not comply with Local Rule 7.1(a)(2).

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that the ***rule of law*** does apply to the fact. Hence, defendant's motion to dismiss should be denied.

3. Plaintiff did name the Defendant Correctly

The ***facts*** **and** ***circumstances*** that the defendant mentioned that there is no entity known as "Land America Commonwealth" is nebulous. (See exhibit 1- Motion 1)

The issue covered by the ***Rule of law*** of Federal Rule of Civil Procedure 9(a) is "Pleading Special Matters".

Analysis – In the Enclosed Exhibit 2, the official stationery with name and address of the company letter head next to the logo states "Land America Commonwealth". The fact helps to prove that the company also referred itself as "Land America Commonwealth". Plaintiff reaches the conclusion that he did refer to the company correctly. However, plaintiff ascertains to refer to the company by the name of "Commonwealth Land Title Insurance Company" or "Commonwealth" as instructed by its attorney.

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that the ***rule of law*** cited does not apply to the fact. Hence, defendant's motion to dismiss should be denied.

4. F.R.Civ.P. 12(b)(1) - (Lack Of Jurisdiction Over The Subject Matter)

The ***facts* and *circumstances*** that brought the plaintiff under the Federal Court jurisdiction are that this complaint involve violations of Federal and State Law and the plaintiff and defendants are citizens of different states (see Verified Complaint, ¶12). As a whole, the complaint is based on actual count of facts and claims based on Federal Law since plaintiff has pursued and exhausted all administrative remedies prior the filing of this action in Court.

The issue is covered by the ***Rule of law*** which are 28 U.S.C § 1331, 28 U.S.C § 1332 and 28 U.S.C § 1391.

Analysis - The fact helps to prove that the rule was created by Article III of the U.S. Constitution expressly creates a federal court system, and Section 2 of that Article further declares that *jurisdiction. Also,* Federal Courts may hear only those cases involving federal laws, federal or sovereign parties (including states), or disputes between citizens from different states. Defendant is foreign corporation from Pennsylvania doing business in Massachusetts.

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that based on the ***rule of law,*** the United States District Court, District Court of Massachusetts has venue and power to hear and decide on this case whose subject matter fits within the court's scope of authority. Hence, defendant's motion to dismiss should be denied.

5. F.R.Civ.P. 12(b)(6) - (Failure to state a claim upon which relief can be granted)

The *facts* and *circumstances* that brought the plaintiff to court against "Commonwealth" are cited on (¶ 32) of Verified Complaint. By invoking F.R.Civ.P. 12(b)(6), defendant is suggesting that plaintiff's factual allegations must be taken as true for the purpose of the court ruling on the motion. Since defendant's motion does not replace the trial, real and factual issues based on circumstantial evidence and prior conclusion should be drawn favorably for the plaintiff. Since there are matters outside the complaint allegations, then this motion could be viewed as a "Summary Judgment".

The issue is covered by a ***Rule of law*** of F.R.Civ.P. 12(b)(6) which states, if, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Analysis - The fact helps to prove that when considering defendant's motion, the court must construe the factual allegations in the light most favorable to plaintiff with all doubts resolved in the pleaders favor and the allegations taken as true. The purpose of (¶, 32) of verified complaint was to give defendant fair notice of plaintiff's claimed and the rule of law for basing the argument. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002). With regard to Fed. Rule Civ. P 12(b)(6), court should dismiss a suit under FRCP 12(b)(6) only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim that entitled him to relief. Conley v. Gibson, 355 U.S. 41, 45-48 (1957).

The rule also state that a dismissal under failure to state a claim upon which relief can be granted would have to be "treated as one for summary judgment", and "all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56" as stipulated in Fed Rule Civ. P, Rule 12(b). Then, in the absence of given plaintiff the opportunity to present sworn affidavits as well as the opportunity to conduct some kind of discovery against defendants and to request admissions and conduct interrogatories, plaintiff reaches the conclusion that justice will not be served based on the notion that the Fourteenth Amendment to the Constitution requires that plaintiff be allowed his Due Process rights to prove these claims by a preponderance of the evidence. Plaintiff has the legal right, and a moral duty, according to the constitution, the 7th amendment to present his evidence to a jury and let them decide based on the finding of fact and the principle of equality and fundamental fairness.

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that based on the ***rule of law,*** he has satisfied the burden of stating a claim against "Commonwealth". Plaintiff's complaint need not alleged any specific wrong per se; rather it must merely notify the defendant of the nature of the claim and state the 'Relief Sought' which can be viewed on page 24 of the Verified Complaint. Plaintiff also alleges that all defendants are liable for damages by virtue of their part in the civil conspiracy and trampling on the rights of plaintiffs by violating Federal and State Law. Hence, defendant's motion to dismiss should be denied.

6. Plaintiff has stated a Cause of Action against Defendant

The ***facts* and *circumstances*** that brought the plaintiff to court against defendants is the civil conspiracy in violation of the Massachusetts Laws on Predatory Lending and Acts as described in (¶, 32). As stated on page of defendant unverified motion that "Commonwealth is now the holder of the DanversBank Mortgage by assignment dated on March 9, 2006 and recorded in Book 19994, Page 290, defendant has assumed all the liabilities and wrong doings of DanversBank such as the violation of 14th Amendment (without prior notification and hearing, due process and court order to collect the rent from the management company that the plaintiff had a contract with. *Defendant forced plaintiff to seek default remedy against his will and carrying out foreclosure procedure that violated the rule of law of the United States of America, led to the invasion of plaintiff right to privacy, bullying the plaintiff wife which caused her to move out-of-stated by invading plaintiff privacy in discussing plaintiff's confidential business* *matters with his wife, inflicted emotional harm, separation from children and loss of consortium as well.(emphasis added)*

The issue is covered by a ***Rule of law*** under the US CODE: Title **42, 1983**; Civil action for deprivation of rights, U.S. Constitution's 1st Amendment, 5th Amendment, 7th Amendment, 10th Amendment and the 14th Amendment ('No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws') as well as Massachusetts Law on Predatory Lending.

Analysis - The fact helps to prove that the plaintiff alleged unequivocally that the defendant(s) has (have) deprived him of his rights and privileges under the constitution and Laws of the United States. The rule requires that plaintiff should have been notified or be given an opportunity to be heard in court and not be forced into bankruptcy by DanversBank as described in (¶ 12 to 27) of verified complaint. Defendant also violated of Massachusetts Law, Chapter 183C, Section 15 and 18 are testimony that the rule of law must be applied in view of public policy issue.

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that the ***rule of law*** does apply to the fact. Plaintiff has sufficiently alleged facts necessary to prove each element of his causes of action. Hence, defendant motion to dismiss should be denied.

7. Violation of Due Process of Plaintiff's Property Rights

The ***facts* and *circumstances*** that brought the plaintiff to court in alleging 'Bad Faith' (Paragraph 17 of Verified Complaint) is that DanversBank (who has now Assigned that 2nd mortgage to Defendant) refused to meet with him to discuss renegotiation of the terms of the contract since plaintiff realized due to the degradation of the social, political and economical situation in Haiti at that time, he would not be able to maintain his contractual agreement. Also, while away on a business trip, DanversBank illegally (usurped their authority) by collecting the rent monies of plaintiff's properties from the management company (plaintiff had a bilateral contract with the Management Company) without notice and hearing before a Judge.

The issue is covered by a ***Rule of law*** define by the Constitution of the United States in particular the 5th and 14th Amendments of the Bill of Rights.

Analysis - The fact helps to prove DanversBank did not give plaintiff notice or opportunity for a hearing or simply the opportunity to be heard. The rule requires that DanversBank obtained a Court Order in order for the rule to apply which is contrary to the fact. Then, in the absence of that circumstance, plaintiff reaches the conclusion that DanversBank violated his 5th and 14th Amendments rights.

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that the ***rule of law*** defined by the 5th and 14th Amendment does apply to the fact. At a minimum due process requires that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case Hence, defendant motion to dismiss should be denied.

8. Plaintiff's Defense of Property Rights

The ***facts* and *circumstances*** that brought the plaintiff to court is that Defendant violates his right to be heard as described in paragraph 10 above. Plaintiff had pursued remedies from Department of Urban and Housing Development, His Mortgage company in terms of Refinancing, Danversbank itself, the Attorney General Office, the Consumer Protection Division of Massachusetts, Senator Edward M. Kennedy, Congressman Marty Meehan, Community Team works, the Small Business Administration and so many other agencies in hope to find some kind a way to alleviate the situation. In all instances or for the most part, plaintiff was told to speak to the Bank in question, but DanversBank refused to meet with me but suggested that he filed for Bankruptcy as a default remedy. Plaintiff exhausted all avenues and was forced into bankruptcy in order to protect his property rights.

The issue is covered by a ***Rule of law*** the Common Law which is analogous to the plaintiff's dilemma as follows:

> In *Beard v. U.S.* (158 U.S. 550, 1895), the Court approved the common law rule that a person "may repel force by force" in self-defense, and concluded that when attacked a person "was entitled to stand his ground and meet any attack made upon him with a deadly weapon, in such a way and with such force" as needed to prevent "great bodily injury or death."

Analysis – The fact helps to prove the rule of natural right of self-defense which is part of human nature in protecting life, liberty or property. Plaintiff could not have said it better than Thomas Paine, "Weakness allures the ruffian, but arms, like laws, discourage and keep the invader and plunderer in awe, and preserve order in the world as well as property. Horrid mischief would ensue were the law-abiding citizens deprived of the use of them, and the weak will become a prey to the strong." Therefore, the only 'arms' the plaintiff had to repel the undeniable violations of plaintiff's civil rights, individual rights, due process and natural rights was to file for bankruptcy protection. The transcript under oath of the meeting with the Trustee will ascertain and testify to the fact that plaintiff was forced into bankruptcy without his will. Then, in the absence of filing for bankruptcy, plaintiff would not be in a position today to seek emancipation and redress from the court as described in the first amendment of the United States Constitution.

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that the analogous ***rule of law*** does apply to the fact. Hence, defendant motion to dismiss should be denied.

9. Plaintiff has standing and Capacity based on the 1st, 5th and 14th Amendments of the U.S

The ***facts* and *circumstances*** that brought the plaintiff to court can be inferred based on the questionable assignment on March 9, 2006 of DanversBank's mortgage to the defendant ("Commonwealth") being a title company as stated on page 2, the second line of first paragraph. Also according to exhibit 2, Defendant ('Commonwealth') committed fraud and false statement when it report on March 29, 2004 that the title was clear for closing with the intent to cover up for the civil conspiracy with the other defendants. *So the question is why did Commonwealth willingly assumed the right of a bank 2nd mortgage from Danversbank that had no business relationship with defendant until their once again civil conspiracy on March 9, 2006? Is this a pattern of conduct of Commonwealth? To this day, neither Danversbank nor Commonwealth have disclosed to plaintiff the terms and the reasons for the assignment?* (emphasis added). From my basic knowledge of banking and mortgage, plaintiff cannot point to any relevant evidence that title company is in the business of buying or assuming secondary mortgages unless perhaps there are a 'cover up', civil conspiracy, fraud and false statement, bad faith, common law fraud and negligence as alleged by the plaintiff. The Civil conspiracy included 1)defendant (commonwealth), 2) New Century Mortgage underwriter, 3) Allied Home Mortgage, 4) Attorney Samuel P. Reef, 5) Beacon Appraisal, 396 W. Broadway, Boston, MA 02127, Tel. 617-269-1210 (conducted the appraisal on the property) which resulted in the over financing of plaintiff residential home by failing to report that there was an existing 2nd mortgage on the property and recently with DanversBank in March 9, 2006. False information were recorded on the 1003 of the capacity of the primary borrower to obtain a loan and stating as illustrated in **exhibit 3** that title was clear which was a false statement in order to cover up for the central cause that led to Predatory Lending which is a violation of both Federal and Massachusetts Laws.

The issue is covered by a ***Rule of law*** by the Constitution of the United States of America as follows: "Congress shall make no law … abridging … the right of the people … to petition the Government for a redress of grievances." — From the 1st Amendment. It is also based on the Rule 6009. Prosecution and Defense of Proceedings by Trustee or Debtor in Possession. With or without court approval, the trustee or debtor in possession may prosecute or may enter an appearance and defend any pending action or proceeding by or against the debtor, or commence and prosecute any action or proceeding in behalf of the estate before any tribunal. (emphasis added)

Analysis – The Supreme Court of the United States has stated, "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975). As stated there, "The Judicial Power shall extend to all Cases . . . [and] to Controversies . . ." The requirement that a plaintiff have standing to sue is a limit on the role of the judiciary and the law of Article III standing is built on the idea of separation of powers. Allen v. Wright, 468 U.S. 737, 752 (1984). Federal courts may exercise power only "in the last resort, and as a necessity." Id. at 752. Plaintiff has additional capacity and standing as prescribed by rule 6009 of the Federal Rule of Bankruptcy Proceeding which states that 'with or without court approval, debtor …may initiate any action …before any tribunal'.

The issue of 'Jurisdiction'raised by a ***Rule of law*** of F.R.Civ.P. 9 is answered on paragraph # 4 of this memorandum. Also, based on the detail rebuttal made by plaintiff, he cannot find any 'specific negative averment' as outline in that rule.

Bankruptcy rules state that (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate. (c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title. Accordingly, a 'denial final judgment' (see exhibit 6, # 76) was entered on March 22, 2006 during a notice and hearing. On April 17, 2006, the Trustee filed a Report of No Distribution (see exhibit 7, # 87)

The rule 6009 as stated above does not requires plaintiff to have court approval necessarily to bring what plaintiff consider as a natural right as described in Paragraph 1 of Emancipation Redress section E. If motion to dismiss is granted, defendant will ultimately retaliate against plaintiff's property rights since plaintiff equal protection under the law would be practically nonexistent and that justice will not prevail. Plaintiff needs to conduct discovery to fully trace and to expose all the facts and evidence to the a jury. Moreover, plaintiff will suffer an imminent injury from defendant such as the continuing violation of Due Process on his property rights although the defendant's default judgment is invalid since there was no notice or hearing for plaintiff's opportunity to be heard prior obtaining the default judgment.

Plaintiff strongly believe that his action is based on merit, facts and circumstances that can be proven favorably in the court of law to obtain a decision to redress his violation of his 1^{st} , 5^{th}, 14^{th} Amendments rights and other relevant Federal and State law upon complaint are based.

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that the ***rule of law*** does apply to the fact. Plaintiff alleges that **Special damages** are due, to be specifically stated at a future date although stated generally, due to the special circumstances of this case and the public policy issues involved. These damages can be pleaded with more particularity after the discovery process is completed. Then, in the absence of denying defendant's motion to dismiss, plaintiff reaches the conclusion his constitutional rights and rule 6009 of FRBP would be violated. Hence, defendant motion to dismiss should be denied.

10. Plaintiff and FRBP of Rule 5009

The ***facts* and *circumstances*** that brought the plaintiff to court were the result of DanversBank 'deceitful acts and declarations' and total disregard and illegality uses of the rule of law forced plaintiff in bankruptcy to protect his property rights. In the bankruptcy filing, plaintiff did list his house as exempt. Essentially, Danversbank has assigned all their liabilities to defendant (Commonwealth). Plaintiff's property listed as exempt has not been administered by the Trustee. Also, upon a phone conversation held with the office of the trustee on March 14, 2006, plaintiff was told that the Trustee has nothing to do with his property and to consult an attorney.

The issue is covered by a ***Rule of law*** based on the Federal Rule of Bankruptcy Procedure of Rule 5009. Closing Chapter 7 Liquidation, which states, If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

Analysis – On March 13th, 2006, as described in (exhibit 4, #63), plaintiff sought the protection for his house under the chapter 7 protection. A notice and a hearing was held on March 21, 2006 (see exhibit 5, #73) whereby plaintiff was seeking to add his house as part of the bankruptcy to protect his property right but the Judge denied the motion (see exhibit 6, #76).The fact helps to prove the rule since on April 17, 2006 (see exhibit 7,#87), the Trustee filed a Trustee's Report of No Distribution states as follows: "…has received no property nor paid any money on account of the estate except exempt property, and diligent inquiry having been made, trustee states that there is no nonexempt property available for distribution to creditors. Pursuant to FRB 5009, trustee certifies that the estate is fully administered and requests that the report be approved and the trustee discharged from any further duties. (Entered: 04/17/2006 at the United States Bankruptcy Court, District of Massachusetts)".

Conclusion - From the ***analysis,*** plaintiff comes to the ***Conclusion*** that the ***rule*** requires of FRBP 5009 is in order and the rule does apply to the facts and circumstances. Hence, defendant's motion to dismiss should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above document was delivered in person May 16th, 2006 to US District Court, District of Massachusetts, Boston and served by United States Postal Mail, postage upon counsel for the defendants ('Commonwealth') mailed on May 16, 2006.

x *Pierre R. Augustin*

Pierre R. Augustin, 28 Cedar Street,
Lowell, MA 01852, 617-202-8069

VERIFICATION

I, *PIERRE R. AUGUSTIN*, hereby depose and state as follows:

1. I am *PIERRE R. AUGUSTIN*, represented by self.
2. I have read the foregoing amended Complaint filed herein and knowing the contents thereof have found that the allegations of fact set forth therein are true of my own personal knowledge, except as to those allegations based on information and belief which I believe to be true.

Signed under the penalties of perjury this *May* day of *16* 2006.

x *Pierre R. Augustin*

STATE OF *MASSACHUSETTS*
COUNTY OF *MIDDLESEX*

On this *16* day of *MAY*, 2006, before me, the undersigned notary public, personally appeared *PIERRE R AUGUSTIN*, proved to me through satisfactory evidence of identification, which was *MASSACHUSETTS DRIVER LICENSE PICTURE*, to be the person whose name is signed on the preceding or attached document, and acknowledged to me that s/he signed it voluntarily for its stated purpose.

[signature], Notary Public

My Commission Expires: *MAY 28, 2010*

(SEAL)